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Trusts--Power to Distribute from Corpus Does Not Entail Power to Terminate Trust (Kemp v. Paterson, 6 N.Y.2d 40 (1959))

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a policy-making official, such as petitioner, should enjoy the privilege. The Court summed up its reasoning by saying that "the concept of duty encompasses the sound exercise of discretionary authority." [41] Mr. Justice Black concurred, on the ground that petitioner acted within the scope of his authority. Mr. Justice Stewart dissented on the basis that the press release was beyond the perimeter of petitioner's authority.

Perhaps the dissenting opinion of Justices Warren and Douglas and also that of Mr. Justice Brennan present a sounder appraisal of the problem. It has been submitted that the proposed test embodied within the Court's opinion may require in each case an evaluation of the position of the officer and the duties of his office,[42] placing a possible burden on the plaintiff to negate the raising of the defense of absolute privilege.[43] It would seem a better policy to grant these officials a qualified privilege for statements to the public, limiting absolute privilege to those officers appointed by the President or directly responsible to him. The case for qualified privilege is strong. To overcome a qualified or conditional privilege a plaintiff must prove that the communication was defamatory, untrue and activated by actual malice.[44] Nevertheless, this would construct a strong protective wall about our government personnel in the course of their official duties, without unnecessarily encroaching upon the rights of the individual citizen.

TRUSTS — POWER TO DISTRIBUTE FROM CORPUS DOES NOT ENTAIL POWER TO TERMINATE TRUST.—Plaintiff-trustees sought a judgment authorizing the termination of a trust by the payment of the principal in a lump sum to the beneficiary in order to avoid excessive tax rates. The agreement authorized the trustees to pay from time to time to the life beneficiary so much of the principal as the

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appropriate exercise of the discretion with which an executive officer of petitioner's rank is necessarily clothed to publish the press release here at issue in the circumstances disclosed by this record." *Ibid.* (Emphasis added.)

[41] *Id.* at 575.

[42] "As the Government acknowledged on oral argument, Congress, when it creates executive agencies, almost never expressly authorizes the new agency to issue press releases as part of its functions. Nor does it decree which employees of the new agency will have such duties and which will not. By necessity, therefore, the decision will require a de novo appraisal of almost every charge of defamation by a government official." *Id.* at 578-79 (dissenting opinion).

[43] *Id.* at 579.

[44] *Id.* at 586.

trustees might in their discretion deem for her best interests. Despite the broad scope of discretionary power granted by the deed, the Court *held* that it was not within the intention of the settlor to empower the trustees to terminate the trust with one payment to the beneficiary and thus defeat the interests of the remaindermen. *Kemp v. Paterson*, 6 N.Y.2d 40, 159 N.E.2d 661, 188 N.Y.S.2d 161 (1959).

Where a trustee has a discretionary power, the court cannot interfere with the exercise of that power except to prevent an abuse of discretion.[1] However, once the court assumes jurisdiction of the trust, there is a divergence of views as to the proper extent of control to be exercised by the court.[2] The rule in Maryland, as provided by statute, is that any party interested in the trust may have the entire trust estate or such part thereof as the court may deem proper administered under the supervision of a court of equity.[3] However, the New York view is that the court cannot substitute its discretion for that of the trustees so as to deprive them of the honest exercise of the discretionary power vested in them.[4]

As a general rule, a trust is terminated when its purpose has been fulfilled.[5] However, the settlor may, expressly [6] or impliedly,[7] authorize the trustees to terminate the trust when, in their discretion, they deem it proper. Once it is determined that the trustee has in his discretion the authority to terminate the trust, the court will only

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[1] 1 RESTATEMENT (SECOND), TRUSTS § 187 (1959); 3 RESTATEMENT (SECOND), TRUSTS, Reporters' Notes § 187 (1959); LEWIN, TRUSTS 332 (15th ed. 1950); 2 SCOTT, TRUSTS § 187 (1939).

[2] See the cases cited in 2 SCOTT, *op. cit. supra* note 1, at 988 n.1.

[3] MD. ANN. CODE art. 16, § 193 (1957). Earlier cases construed this rule so as to authorize the court to substitute its discretion for that of the trustees whenever it assumed jurisdiction. Abell v. Abell, 75 Md. 44, 23 Atl. 71 (1891). See 2 PERRY, TRUSTS § 474 (7th ed. 1929). This construction has been limited so that today only when an application is made under this section must the trustee submit to the supervision of the court for all of his further administrative acts. Offutt v. Offutt, 204 Md. 101, 102 A.2d 554, 557 (1954). This rule seems not to be generally followed.

[4] *In re* Hilton, 174 App. Div. 193, 160 N.Y. Supp. 55 (1st Dep't 1916); *In re* Shiel's Will, 120 N.Y.S.2d 632 (Surr. Ct. 1953); Matter of Emmons, 165 Misc. 192, 300 N.Y. Supp. 580 (Surr. Ct. 1937). This view is more commonly followed. See 2 SCOTT, *op. cit. supra* note 1, at 988. See, *e.g.*, Yeates v. Box, 198 Miss. 602, 22 So. 2d 411 (1945) (dictum); Viall v. Rhode Island Hosp. Trust Co., 45 R.I. 432, 123 Atl. 570 (1924) (dictum). In both of these cases the court did interfere because it found the trustees had acted dishonestly.

[5] Seeberg v. Norville, 204 Ala. 20, 85 So. 505, 507 (1920); Yeates v. Box, *supra* note 4, at —, 22 So. 2d at 415; Angell v. Angell, 28 R.I. 592, 68 Atl. 583 (1908).

[6] Hotchkiss v. McWhorter, 158 Ga. 259, 123 S.E. 265 (1924); Cary v. Shad, 220 Ill. 508, 77 N.E. 234 (1906).

[7] See, *e.g.*, *In re* Osborn, 252 App. Div. 438, 299 N.Y. Supp. 593 (2d Dep't 1937); *In re* Rosenberg's Will, 121 N.Y.S.2d 874 (Surr. Ct. 1953); *In re* Abert's Estate, 118 N.Y.S.2d 864 (Surr. Ct. 1950). Where the authority is implied, the settlor's intent must be construed in light of all surrounding facts and circumstances. *In re* Golodetz's Will, 118 N.Y.S.2d 707 (Surr. Ct. 1948).

interfere with the exercise of that discretionary power where it is motivated "from caprice, careless good nature or the desire to obtain relief from further fiduciary duties." [8] Where the settlor has subjected the remaindermen's interest to an invasion of principal for the life beneficiary, the remaindermen only have the right to whatever is left after the death of the life beneficiary.[9] The rights of remaindermen are subordinate to the primary purpose of the trust as indicated by the settlor's intent.[10]

There has been a tendency to use the best interests of the beneficiary as a standard to control the discretionary powers of a trustee.[11] The term "best interests" is a broad, flexible standard which embraces such objects and purposes as in the trustee's judgment would be beneficial to the *cestui que trust.*[12] However, the standard of best interests is not without limitation.[13] In the first place, the trustee is bound to act within the framework of the purposes of the trust.[14] He is also obliged to meet the test of reasonableness.[15] Where, by the terms of the trust, the trustee is directed to pay as much of the principal as he believes would be for the beneficiary's best interests, he would be guilty of an abuse of discretion if it clearly appears that he is paying the beneficiary less than any reasonable man would in a like situation.[16]

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[8] *In re* Rosenberg's Will, *supra* note 7, at 877. See also Roosevelt v. Roosevelt, 6 Hun 31 (Sup. Ct. 1875), *aff'd mem.*, 64 N.Y. 651 (1876); Portsmouth v. Shackford, 46 N.H. 423, 426 (1866). However, the court is quick to admonish the trustee where he has acted from fraudulent, selfish or other improper motives. See *In re* Wilkin, 183 N.Y. 104, 75 N.E. 1105 (1905); Wallace v. Julier, 147 Fla. 420, 3 So. 2d 711 (1941); *In re* Buchar's Estate, 225 Pa. 427, 74 Atl. 237 (1909). See also 2 PERRY, TRUSTS § 511 (7th ed. 1929).

[9] See Matter of Osborn, 252 App. Div. 438, 445, 299 N.Y. Supp. 593, 600-02 (2d Dep't 1939) (dictum).

[10] Longwith v. Riggs, 123 Ill. 258, 14 N.E. 840 (1887); Petition of Wolcott, 95 N.H. 23, 56 A.2d 641 (1948).

[11] See McLucas, *Discretionary Trusts*, 37 TRUST BULL. 17, 71-72 (1958).

[12] See generally, Bowditch v. Attorney General, 241 Mass. 168, 175, 134 N.E. 796, 800 (1922). The term "best interests" includes the authority to do whatever adds to the beneficiary's welfare and advancement.

[13] Fleming, *"Best Interests" As A Standard For Trustee Action*, 46 ILL. BAR J. 765 (1958).

[14] Matter of Ahrens, 193 Misc. 844, 84 N.Y.S.2d 486 (Surr. Ct. 1948), *aff'd mem.*, 301 N.Y. 701, 95 N.E.2d 53 (1950). The purpose of the trust is determined not only by construing the trust instrument itself but also by considering the factual situation surrounding the creation of the trust in light of the testator's intent. See *In re* Golodetz's Will, 118 N.Y.S.2d 707 (Surr. Ct. 1952); Yeates v. Box, 198 Miss. 602, 22 So. 2d 411 (1945); McLucas, *The Discretionary Trust*, 92 TRUSTS & ESTATES 824 (Nov. 1953).

[15] Peach v. First Nat'l Bank, 247 Ala. 463, 25 So. 2d 153 (1946); Ducan v. Elkins, 94 N.H. 13, 45 A.2d 297 (1946); Viall v. Rhode Island Hosp. Trust Co., 45 R.I. 432, 123 Atl. 570 (1924).

[16] 2 SCOTT, TRUSTS § 187.2 (1939).

The discretion of the trustee must also be exercised in good faith [17] and with proper motives.[18]

In the instant case, the Appellate Division determined that though the purposes for which the trustees sought to terminate the trust would "in a sense . . . serve the beneficiary's 'best interests,' " that term should not be interpreted in its broadest meaning, but should be limited, so as not to extend beyond the scope of the trust deed.[19] The Court of Appeals affirmed stating that though it is within the discretionary power of a trustee to pay out all of the corpus of the trust for the beneficiary's best interests in a proper case, this was not such a case since it would be inconsistent with the intent of the settlor.[20] The dissent, however, clearly points out that the purpose of any settlor in establishing a trust is to secure the benefits which inure from its very nature, that is, flexibility and the good judgment of a dependable trustee. Therefore, it could not be the intent of this settlor to deny to the trustees the power to terminate when admittedly [21] it would be for the best interests of the beneficiary. Here the trustee sought to provide for the best interests of the beneficiary by terminating the trust. This would provide better support and education for her children and avoid oppressive tax rates. Under existing tax statutes, the trust income was subject to a tax of 92½ per cent which entitled the tax collector to $32,375 and the beneficiary to $2,625. If the beneficiary died, the corpus would be subject to a British estate tax of 65 per cent, leaving a remainder interest of $245,000 out of an estate of $700,000.[22]

The majority view strictly construes the intent of the settlor as limiting the trustees' authority to exhaust the trust by one payment which in their judgment is for the best interests of the beneficiary. This seems to break away from a tendency to liberally construe the settlor's intent to confer broad discretionary powers on a trustee.[23] For example, in 1950 the Surrogate Court of New York County

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[17] Lenzner v. Falk, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); Richmond v. Stamm, 339 Ill. App. 274, 89 N.E.2d 745 (1949); *In re* Filzen's Estate, 252 Wisc. 322, 31 N.W.2d 520 (1948).

[18] Funk v. Commissioner, 185 F.2d 127 (3d Cir. 1950); Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951).

[19] Kemp v. Paterson, 4 App. Div. 2d 153, 156, 163 N.Y.S.2d 245, 248 (1st Dep't 1957).

[20] Kemp v. Paterson, 6 N.Y.2d 40, 43, 159 N.E.2d 661, 662, 188 N.Y.S.2d 163 (1959).

[21] Although the Court of Appeals did not expressly admit that it was in the child's best interests, it adopted the opinion of the Appellate Division which did expressly hold that it was in her best interests.

[22] Kemp v. Paterson, *supra* note 20, at 45, 159 N.E.2d at 663, 188 N.Y.S.2d at 164.

[23] *In re* Wilkin, 183 N.Y. 104, 75 N.E. 1105 (1905); *In re* Rosenberg's Will, 121 N.Y.S.2d 874 (Surr. Ct. 1953); *In re* Abert's Estate, 118 N.Y.S.2d 864 (Surr. Ct. 1950).

held that authorizing the trustee to make payments "from time to time" did not prohibit the trustee from turning the entire principal over to the beneficiary in one payment.[24] In 1953, the Surrogate Court of Bronx County permitted the trustee to terminate a trust with one payment when he deemed it necessary to carry out the purposes of the trust.[25]

In the instant case it is clear that the settlor's intent in establishing the trust was to secure flexibility in the management of her estate so that the "best interests" of the beneficiary would be furthered in accordance with changing conditions. To carry out this intent, the settlor authorized the trustees in their discretion to manage the estate in the best interests of the beneficiary. For the Court to deny the trustees' authority to terminate the trust would seem to usurp the discretionary power granted to the trustees.

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[24] *In re* Abert's Estate, note 23 *supra.*
[25] *In re* Rosenberg's Will, note 23 *supra.*